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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

VS.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITONER THE EMPORIUM CAPWELL CO.

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INTRODUCTION

The principal argument of both respondent WACO and the Department Store Employees Union, Local 1100 (*amicus curiae*), is that the activities of Hawkins and Hollins did not amount to a demand for bargaining. Both WACO and the Union argue (a) that Hawkins and Hollins were merely seeking to present a grievance and (b) that they were merely publicizing a dispute.

The second argument of both parties is that the activities of Hawkins only minimally affected the Union's operations.

Third, the Union argues (Union Br. 11) and WACO agrees (Resp. Br. 30) that Hawkins and Hollins were not discharged for attempting to bargain but merely for leafletting.

Here WACO and the Union part company. WACO argues that the exclusivity provided by Section 9(a), Labor Management Relations Act must be subordinated to the paramount importance of the minority employee's objectives. (Resp. Br. 39.) The Union refuses to discuss this question, saying that "the case does not require the resolution of this difficult issue." (Union Br. 10.)

In addition, although WACO is silent on the subject, the Union strongly objects to the action of the court below in setting a standard of unions' responsibility for representation in discrimination cases sharply differing from the standard established by this Court in *Vaca v. Sipes,* 386 U.S. 171. (Union Br. 24, fn. 20.)

ARGUMENT

I. EVIDENCE AMPLY SUPPORTS FINDING THAT HAWKINS AND HOLLINS ATTEMPTED TO ENGAGE IN COLLECTIVE BARGAINING.

A. This finding by the NLRB was not disturbed by the court below.

Both respondent and the Union as *amicus curiae* argue before this Court that Hawkins and Hollins did not attempt collective bargaining. This contention has no support in the decision of the Trial Examiner, the NLRB or the court below. In urging as their principal argument that Hawkins and Hollins were not attempting to engage in collective bargaining, WACO and the Union undertake to prove that the Trial Examiner was wrong, the Board was wrong and that all the judges on the court of appeals were wrong on this issue.

The Trial Examiner declared:

> "The evidence further establishes that this was no mere presentation of a grievance, but nothing short of a demand that respondent bargain with the picketing employees for the entire group of minority employees." (Pet. App. 103.)

The Board adopted the findings, conclusions and recommendations of the Trial Examiner, adding:

> "For the reasons stated by the Trial Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and *seeking to initiate direct negotiations with respondent* by picketing and boycott activities were not protected by the Act." (Pet. App. 55.) (Emphasis supplied.)

A majority of the court below said:

> "Petitioners argue that they only wanted to 'talk' with the Company's president and 'discuss' the situation. They dispute the Trial Examiner's finding that Hawkins and Hollins activities were 'no mere presentation of a grievance, but nothing short of a demand that [the Company] bargain with the picketing employees for the entire group of minority employees'. TXD at 14. *However, we can see no reason to disturb this finding.*" (Pet. App. 24, fn. 34.) (Emphasis supplied.)

Dissenting Judge Wyzanski stated it even more forcefully. He said:

> "In the case at bar the facts as viewed by the NLRB make it plain that Hawkins and Hollins sought to present to the management of Emporium *not their personal grievances,* such as their individual failure to be accorded their due under the collective bargaining agreement, or such as the *adjustment of some wholly individual complaint.* What those two men wanted was a *change in management's policies* in promoting, hiring, and otherwise treating that class of workers within the unit who were not white in color. [Citations omitted.] *There could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from and adjustment of grievances.* (Pet. App. 42.) (Emphasis supplied.)

As Judge Wyzanski pointed out, Hawkins and Hollins did not seek to present their personal grievances or the adjustment of some wholly individual com-

plaint. Respondents themselves pointed out that Hawkins and Hollins objected to the fact that the Union intended to confine the scope of the grievances to employees in only one department of the store. (Resp. Br. 6.)

Respondent quotes Hollins as follows:

> ". . . We didn't want to have our cases taken as an individual thing . . . . [W]e wanted it taken as a whole for the entire betterment of the minority groups of black, brown, red and yellow people there at the store." (Resp. Br. 6-7.)

Respondent later declares "they leafletted because racial discrimination at The Emporium persisted . . . . *When, eventually, they abandoned the Union, they* did so to compel their employer *to cease discrimination where they worked.*" (Resp. Br. 19.) (Emphasis supplied.)[1] Finally respondent states: "Secondly, their objective was to remedy that discrimination for all minorities." (Resp. Br. 29.)

B. Hawkins and Hollins' conduct was not the presentation of a grievance within the meaning of Section 9(a) of the LMRA.

Section 9(a) of the LMRA states:

> "*Provided,* that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with

[1]Contrary to the repeated assertions by WACO that discrimination in fact existed (Resp. Br. 2, 3, 5, 7, 17, 19, 32), the record fails to show that any discrimination existed. In fact the General Counsel disavowed any intention of establishing that it did exist. (Pet. App. 90-91.)

> the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

The only reasonable interpretation or construction that can be placed on this language is that it refers to individuals presenting their own personal grievances or to a group presenting grievances limited to the members of that group.

That is not what Hawkins and Hollins sought to do. They not only wanted to correct all alleged discrimination throughout the store but attempted to represent all minority employees in doing so.

There is another reason why this could not constitute the presentation of a grievance within the meaning of Section 9(a). If Hawkins and Hollins without authorization from anyone could present a grievance on behalf of all minority employees, they could effectively destroy the rights of those employees to present their own grievances personally. Furthermore, the Union was never given "an opportunity to be present at such adjustment" as required by Section 9(a).

Finally, the grievance was not presented to the employer.[2] The employer in this case was San Francisco Retailers Council as the representative of all

---

[2]See, for example, Morris, "*The Developing Labor Law*," Section of Labor Relations Law ABA, 1971, p. 236:

> "Once the unit is formed, the multi-employer group becomes the employer for purposes of bargaining, with the obligation under Sections 8(a)(5) and 8(d) to bargain collectively with the representative of all the employees in the unit."

stores, parties to the multi-employer contract. The Union correctly presented its grievance to the Council as the employer under the collective bargaining agreement. Hawkins and Hollins did not.

C. Testimony proves intent to bargain.

Hawkins and Hollins made it clear in their testimony what they were trying to do. Hawkins testified as follows:

> "Q. (By Mr. Bahrs) You appeared before the union and asked the union to do what, sir?
>
> A. We were talking about brown, yellow and red people, black, too.
>
> Q. Were you asking *the union* to appear before the San Francisco Retailers Council on behalf of all brown, red and yellow people?
>
> A. *We were trying to represent them.*" (A. 32-33.)

Hawkins further testified as follows:

> "Q. Did you appear at the meeting of the adjustment board on the 18th?
>
> A. Yes, I did, we did.
>
> * * *
>
> Q. And will you tell us what took place at that meeting?
>
> A. Mr. Hollins made a statement that we were not going to speak at this meeting as individuals, we were speaking as a group and *our main purpose was to talk to the President to try to reach an agreement with him* to straighten out the problems and conditions of The Emporium." (A. 35.)

It would be difficult to state an intent to bargain any more plainly than this. Hollins testified:

"Q. (By Mr. Kintz) Just to carry it one step further, it was my understanding that what you were trying to do and you didn't want a solution of the problems of individuals, *you wanted some basic change that would benefit the treatment of all minority people,* is that right?

A. That's correct." (A. 61.)

In his testimony concerning the press conference, Hawkins stated:

"Q. (By Mr. Barton) What were you seeking?

A. To try to talk to top management to get better conditions for The Emporium.

Q. How were you going to do this?

A. Through group talks and through the president if we could talk to him." (A. 11.)

Hawkins later stated: ". . . and the purpose of the meeting, of talking to the president was to try to get better conditions, and this was the main purpose of it." (A. 11.)

D. No evidence in the record fairly detracts from the finding that Hawkins and Hollins attempted to engage in collective bargaining.

We are mindful of the admonition in *Universal Camera Corp. v. NLRB,* 340 U.S. 474, that the Court should take into account whatever in the record fairly detracts from the weight of the evidence but we are unable to discover anything in the record indicating no intent to engage in collective bargaining other than the absence of a finding that Hawkins and Hollins sought to obtain a formal written document setting forth the terms and conditions of em-

ployment for minority employees. But as the respondent's brief pointed out:

> "The collective bargaining agreement created contract rights; Hawkins and Hollins attempted to *achieve realization of these rights* for minorities." (Resp. Br. 31.) (Emphasis supplied.)

And as the General Counsel brought out, Hawkins and Hollins wanted some basic change that would benefit the treatment of all minority people. (A. 61.) Finally, the Union brief states:

> "Hollins made a statement to this effect and indicated the minority employees wanted a group solution to the problem and desired to talk with the Company's president *to deal with the general problem of discrimination.*" (Union Br. 8.) (Emphasis supplied.)

Thus, Hawkins and Hollins sought to effect basic changes that would benefit all minority people through discussions with the company's president. Although this may not have the formality of the customary bargaining proceeding, it nevertheless constituted an attempt to bargin collectively.

There is no evidence in the record that "fairly detracts" from Hawkins' testimony that "our main purpose was to talk to the president and to try to *reach an agreement with him.*" (A. 35.)

On this record the finding by the Trial Examiner, the Board and the court below that Hawkins and Hollins attempted to bargain with their employer should be sustained.

II. ACTIVITIES NOT MERE FREE SPEECH

Respondent and the Union argue that all that Hawkins and Hollins were doing was peacefully publicizing their claim that the Emporium was guilty of racial discrimination.

This argument completely ignores the fact, as found by the Board, that Hawkins and Hollins attempted to establish a boycott of the Emporium while still in its employ. It also ignores the fact, as found by the Court of Appeals, that Hawkins and Hollins "rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement." (Pet. App. 24.)

Finally it ignores the fact that Hawkins and Hollins attempted to represent all minorities and to bargain with the management of the Emporium on their behalf. These activities went far beyond the mere exercise of their constitutional right of free speech.

III. FINDING THAT HAWKINS AND HOLLINS ACTED IN DEROGATION OF UNION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

A. Both the NLRB and the Court of Appeals found that Hawkins and Hollins' conduct interfered with the collective bargaining process.

The Trial Examiner stated:

> "In sum, to extend the protection of the Act to the two employees named in the complaint would seriously *undermine* the right of employees to bargain collectively through representatives of

their own choosing, *handicap and prejudice the employees' duly designated representatives in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities . . . .*" (Pet. App. 104.) (Emphasis supplied.)

The Board stated:

". . . Thus the sole issue presented for decision on this record is whether the conduct of the discharged employees was unprotected *because in derogation of the duly designated exclusive bargaining representative.* For the reasons stated by the Trial Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and seeking to initiate direct negotiations with Respondent by picketing and boycott activities were not protected by the Act." (Pet. App. 55.)

The Court of Appeals did not disagree with the Board but said:

". . . nonetheless we recognize that such activity as was engaged in here *does interfere to a certain extent with the collective bargaining process.* In abandoning the grievance procedures and seeking to bargain on their own, the picketers here *rendered essentially ineffective* the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement." (Pet. App. 23-24.)

Thus, there are three findings that Hawkins and Hollins acted in derogation of the Union. These findings are amply suported by the evidence. It is un-

disputed that Hawkins and Hollins walked out of the Adjustment Board hearing and this effectively prevented the Union from proceeding. Walter Johnson, Secretary-Treasurer of the Union testified:

> "*I feel very badly that we were not able to process it* after the testimony was not presented by the affected individuals, and this is very vital testimony, our attorney advised that it *would be very difficult to proceed to arbitration because we would not have a whole case to present.*" (A. 76.) (Emphasis supplied.)

There is no evidence in the record that "fairly detracts" from the weight of the evidence that Hawkins and Hollins rendered essentially ineffective the effort of the Union to present grievances. The findings of interference should therefore be sustained.

B. The extent of such interference was sufficient to remove Hawkins and Hollins' conduct from the Act's protection.

We come now to an interesting thing. After finding that the conduct of Hawkins and Hollins rendered essentially ineffective the efforts of the Union to process the grievance, the Court said:

> "We cannot agree with the Board, however, that this *limited* interference *alone* is sufficient to remove these concerted activities here from the protection of the Act." (Pet. App. 24.) (Emphasis supplied.)

After pointing out that Hawkins and Hollins had first attempted to have their grievance adjusted by the Union and that they were "not working at cross-purposes", the court said:

> ". . . though the immediate adjustment board proceedings were disrupted, *this disruption cannot wholly destroy the protection afforded these employees by* section 7 . . . ." (Pet. App. 26.) (Emphasis supplied.)

It then remanded the case to the Board to inquire "whether the Union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means.*" (Pet. App. 28.)

It will be noted that the court did not hold (as the dissenting judge declared) that Hawkins and Hollins had an *absolute* right to do what they did because they were protesting racial discrimination. Rather, the majority said:

> "Where the union efforts fall short of this high standard, the minority groups concerted activities cannot lose the section 7 protection."

The court here seems to confuse the *extent of interference* with the conduct of the Union. Presumably, if the Union met the standards announced by the court below, the actions of Hawkins and Hollins were unprotected. In other words, the interference would not be a limited interference.

These standards are in conflict with the standards set by this Court in *Vaca v. Sipes,* 386 U.S. 171, and have no statutory authority.

C. The original application to the Union for assistance does not justify subsequent conduct of Hawkins and Hollins.

The court below said:

> "We agree with *Tanner* [*N.L.R.B. v. Tanner Motor Livery, Ltd.,* 349 F.2d 1 (9th Cir. 1964),

> 419 F.2d 216 (9th Cir. 1969)] that even when racial issues are at stake, one should be required to submit such disputes first to the union before one resorts to minority concerted activity." (Pet. App. 24-25.)

But the fact that Hawkins and Hollins *originally* sought help through the Union does not prevent their subsequent conduct from being an interference with and in derogation of the Union. In fact, in this case the interference and derogation was far more extreme than in *Tanner*. In this case, as the Trial Examiner stated, the Union was "endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention." (Pet. App. 103.)

In *Tanner* the opposite was true. The Union not only did nothing to help the employees but actually worked against them. Abramson dented a bumper on his truck and the next day he damaged the door of his truck. This was made the basis for his discharge. Abramson filed a grievance regarding his discharge but with adverse results. The union representatives on the arbitration panel, Lucas and Shore, voted with the employer to uphold the discharge. *Tanner Motor Livery, Ltd. and Martin Abramson,* 148 NLRB No. 137.

The Board stated:

> "The examiner found that Abramson did not receive a fair and impartial hearing. The arbitration panel consisted of four members, Hughes, Barrial, Lucas and Shore. *Abramson could not possibly have obtained a favorable majority.*"

The Court of Appeals for the Ninth Circuit in reviewing this finding said as follows:

> "The Board held that the decision under the grievance procedure did not prevent it from considering the propriety of Abramson's discharge. It cites Section 10(a) of the Act, 29 USC Sec. 160(a), and says that the body that decided to sustain the discharge was not impartial and that its procedure did not meet normal standards as to sufficiency, fairness and regularity. "(citations) we think that its conclusions are supported by the record. *Tanner does not attack them.*" (Emphasis supplied.)

N.L.R.B. v. Tanner Motor Livery, 349 F.2d 1.

We can see no sound basis for holding that the picketing in *Tanner* was unprotected because the employees never sought to act through the union but that the activities of Hawkins and Hollins *were* protected because they *originally* attempted to act through the Union.

In *Tanner,* Abramson picketed *after* he was fired with a sign saying "Jim Crow shop." Dorbin joined the picket line later. This in no way interfered with or prevented the union from doing its duty of attempting to eliminate discrimination. *Tanner* was decided on the basis of the failure to consult the union even though it may well have been an idle act because of the Union's attitude.

Here Hawkins and Hollins interfered with and prevented the Union from acting. Their conduct was directly and obviously in derogation of the Union, far more so than the conduct of the employees in

Tanner. Thus, the court of appeals' distinction between this case and *Tanner* does not support its decision.

D. Hawkins and Hollins were working at cross-purposes with the Union.

The court below said:

> "Second, we find it significant that the union and the petitioners were *not* working at cross-purposes, but were both attempting to eradicate racially discriminatory employment practices." (Pet. App. 25-26.)

In contrast, the Trial Examiner stated:

> ". . . It would be absurd to say that because they and the Union had a common ultimate objective, these four employees were somehow implementing or strengthening the Union in its position." (Pet. App. 103.)

Where, as here, it has been found as a fact that Hawkins and Hollins interfered with the Union, disrupted the adjustment board proceedings, rendered ineffectual the Union's efforts to correct the alleged discrimination and attempted to *replace* and *supplant* the Union and become the representative of the minority employees of the Emporium, the fact that both the Union and Hawkins had the same *ultimate objective,* does not mean they were not working at cross-purposes. The Union wanted to handle the case one way. Hawkins and Hollins prevented this and attempted to handle it another way. This amounted to working at cross-purposes with the Union.

Likewise, to argue, as respondents and the Union do (Resp. Br. 46, citing Union Br. 21-22), that the Union did not oppose Hawkins and Hollins' activity is absurd.

First: It is not true.

Second: The Union could not legally approve or give Hawkins and Hollins permission to bargain with the employer or to attempt to compel the employer to bargain.

Turning first to the so-called "approval" or endorsement of Hawkins' and Hollins' conduct by the Union, we find that the Union states:

> "To be sure, the employees chose to follow their publicity campaign, *contrary to the desires of Union Representative Johnson,* but *at no time did Johnson denounce their action* or demand that they cease distributing their leaflets." (Union Br. 21.) (Emphasis supplied.)

This was because the Union had a "hot potato" on its hands and felt compelled to handle it very gingerly. Johnson did not "denounce" Hawkins and Hollins because this would not have been politic. The Trial Examiner states as follows:

> "6. The Union vs. the picketing
>
> "In view of what appears to be the General Counsel's position that the Union concurred or at least acquiesced in the picketing activities of the two dischargees, in addition to what has already been noted of the differences expressed between the Union's approach to the processing of grievances with respect to the issue of racial dis-

crimination under the bargaining agreement and that pursued by Hawkins and Hollins, it is noted that W. Griffin, the Union's business agent, testified that Johnson did not advise these employees to picket, but told them it was up to them as individuals: that they could take whatever 'actions they wished,' but he hoped they would follow the union program through arbitration and the Adjustment Board. Griffin further testified that after the picketing started he told Hawkins that they—the picketing employees—*were going the wrong way about it,* that they should 'let the Union handle it.' Johnson testified that he never warned or instructed employees not to engage in activities on their own, but at the September meeting, when some employees exhibited frustration, and it was suggested that the Emporium be picketed, the employees were informed 'that we had a contract, we couldn't participate in any boycotting activities, that individuals could take whatever action they wanted to as long as it was legal,' that 'an individual had a right to take action that a Union could not take.' He advised the employees that if the matter went to arbitration it might take as much as 7 months to get a decision, but, according to him, they wanted something 'dramatic.' 'I informed them,' he testified, 'what an individual wanted to do on their own, they could do, but I wasn't going to engage in any drama, but I *wanted some orderly legal procedures that would have some long lasting effect.*' Johnson further testified that he told the employees that the Union accepted no responsibility for their actions as individuals as long as it was not concerned with the contract. '*We will advise them as to what we thought was the best procedure,*

but it was obvious that our advice didn't carry much weight at the time.' Finally, Johnson testified that about the time the pamphlets were being distributed by those picketing he talked to Hollins, *told him that he did not want to see him fired, and that the only way to resolve the matter was through arbitration.* It was then that Hollins replied that the 'only one' they wanted to talk to was the president of Respondent, Batchelder.

"The Union did file a complaint or protest with the Retailer's Council on the discharge of Hawkins and Hollins, but did not file the charge which initiated this proceeding." (Pet. App. 89-90.) (Emphasis supplied.)

Thus, the argument that the Union "approved" the conduct of Hawkins and Hollins is as ill-founded as the argument that they were not working at cross-purposes. Although the Union did not denounce their acts, it never approved them and it advised Hawkins and Hollins not to act as they were doing.

Secondly, the Union could not legally approve the actions of Hawkins and Hollins for several reasons: First: Hawkins and Hollins were seeking to represent an employee unit different from that covered by the Union agreement. Second: They sought to engage in collective bargaining with the employer. Third: They sought to bargain on one subject only. Fourth: This was during the contract year under a contract which contained a "zipper clause." Nothing the Union did could render the conduct of Hawkins and Hollins protected under these facts.

IV. HAWKINS AND HOLLINS' DISCHARGE DID NOT VIOLATE SECTION 8(a)(1) OF THE LMRA

The Union argues:

> "As a matter of uncontested fact, Hawkins and Hollins *were not discharged for any effort to bargain with the Company.* Rather they were discharged for publicly claiming that the Company engaged in racial discrimination. Nowhere in the Company's warning notices, explanations made to the discharged employees, or in the discharge notices is there the slightest suggestion that the discharges were motivated by the employees' independent effort to bargain with the Company." (Union Br. 11.) (Emphasis supplied.)

Respondent's brief quotes this with approval. (Resp. Br. 30-31.)

This argument is appropriate in discharge cases in arbitrations under union contracts which require the employer to state the reason for the discharge. Obviously, if the employer in such case failed to state the reason for the discharge, he would lose the arbitration.

There is no such requirement under the LMRA. Section 8(a) (1) of the Act states:

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

In order to establish a violation of Section 8(a) (1), it would be necessary to prove that Hawkins and Hollins were discharged for engaging in protected

concerted activities. The acts Hawkins and Hollins engaged in were not protected for the reasons set forth above.

As they were not acting in the exercise of the rights guaranteed in Section 7, the employer did not violate the Act in discharging them. The Act does not require that the employer state the reason for their discharge.

The Union states:

> ". . . with slight exception, the company was *not even aware of any intent to bargain* on the part of Hawkins when they were fired and nearly all the evidence pertaining to this issue was adduced only at the Board hearing—long after the discharges." (Union Br. 11.) (Emphasis added.)

But what was adduced at the Board hearing was testimony concerning what occurred at the adjustment board hearing prior to the discharges including the testimony that Hawkins and Hollins wanted to represent all minority employees employed at the Emporium and to talk to the president to reach an agreement with him. The Emporium obviously was present at such hearing and was well aware of all that had taken place.

It cannot be seriously argued that Hawkins and Hollins would have been fired if the only thing they had done was to go to Batchelder and say: "We would like to bargain with you on behalf of all your minority employees." Batchelder would have told them that the Emporium already had a contract and that

if Hawkins and Hollins considered that racial discrimination existed they had three ways to go:

1. Through the Union arbitration procedures.
2. Through the State F.E.P.C.
3. Through the E.E.O.C.

That was the import of the warning notice.

What brought about their discharge was the totality of their conduct, not their mere request to bargain.[3]

V. DELAYS INVOLVED IN EEOC PROCEEDINGS DO NOT JUSTIFY A MAJOR JUDICIAL ALTERATION OF ESTABLISHED FEDERAL LABOR LAW PRINCIPLES.

Respondent argues that the delays involved in Title VII proceedings justify what took place here. (Resp. Br. 53.) However, respondent is not joined in this argument by the Union, the NAACP, or the Urban League. Nor did the court below rely on administrative delay as one of the grounds for its decision.

If respondent's argument is valid, then every minority employee or group of employees in the country would be protected in picketing their employer to compel him to bargain with them whenever they have a good faith belief that racial discrimination exists. This could include several minority groups picketing the employer simultaneously.

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[3]On the subject of disloyalty, we agree with the arguments made in the able brief of the National Retail Merchants Association but will not repeat them here.

The short answer to this argument is that if there is something defective in the EEOC procedures, the remedy is to correct the EEOC procedures, not to set up other procedures in conflict with other federal laws.

VI. FURTHER REASONS COMPELLING REVERSAL OF THE COURT BELOW

We strive not to add to the burdens of this Court by duplicating the able and excellent arguments in the briefs on behalf of the National Labor Relations Board and of *amici curiae* in support thereof. We feel it our duty to say, however, that as long as the language of the court of appeals' opinion stands uncorrected by this Court neither employers nor unions throughout the country will know with any certainty what rules apply where minority employees claim employer discrimination.

A. There is no authority for and no machinery for determining a minority bargaining unit.

The court below relied in part on the following reasoning:

> "There was *no disruption of orderly collective bargaining* in the sense that a minority of employees *were not attempting to speak for the majority* as in the case where a minority group engages in a 'wildcat' strike during company-union negotiations in an attempt to express a rejection of a company offer." (Pet. App. 26.) (Emphasis supplied.)

Later, the court said:

> "The union declined to change its pending complaint to proceed on a 'group' basis. At this point, petitioners abandoned the pending grievance procedure which had been initiated on their behalf and *engaged in concerted activity allegedly on behalf of all minority employees.*" (Pet. App. 26.) (Emphasis supplied.)

These statements, rather than helping the Court's opinion, make it even worse.

Here we have a new unit injected into the picture. It is not one agreed upon by the employer and the union or approved by the Board but is one selected by Hawkins and Hollins. Thus, the court asked the employer to recognize a unit different from that agreed upon with the Union and approved by the Board.

Section 9(b) of the LMRA states that the Board

> "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

It does not provide for a racial unit or for a minority unit. Thus, there is no legal machinery for determining whether or not the unit suggested by the court is appropriate. Moreover, it was not for the purpose of collective bargaining but solely for the purpose of bargaining on one subject, namely racial discrimination. There is no authority in law for such suggestion.

B. No machinery exists for determining representatives of minority bargaining unit.

The Trial Examiner stated:

> "Apparently, they were *self-appointed* for there is no evidence that they were elected or in any way designated by minority employees generally to represent them, they alone walked out of the September 3 meeting, and it does not appear that they were joined in their picketing activities by other Emporium employees." (Pet. App. 101-102.) (Emphasis supplied.)

There is no way in which the employer could safely determine who Hawkins and Hollins actually represented. To require the employer to bargain under such circumstances would result in serious injustice.

C. Settling disputes by the two different simultaneous procedures will not work.

This brings us to the incredible statement of the court: "We cannot agree that any inconvenience which the company might experience in being required to bargain with the minority while still participating in the grievance procedures justifies withdrawing Section 7 protection from these concerted activities." (Pet. App. 29.)

Thus even if the Union failed in its duty to represent the minorities, the court below required the employer to participate with the Union in the grievance procedures involving the minority employees.

No explanation is given as to how the employer could do this in view of the fact that Hawkins and Hollins prevented the Union from proceeding by walking out of the hearing.

Furthermore, as Judge Wyzanski pointed out, there could be no settlement with Hawkins and Hollins for the benefit of the minority employees that did not adversely affect the majority employees in the unit. (Pet. App. 44.)

Respondent points out that Hawkins and Hollins wanted action, not words: "The collective bargaining agreement created contract rights; Hawkins and Hollins attempted to achieve realization of these rights for minorities." If the employer acceded to the demands of Hawkins and Hollins it might well be liable for the type of reverse discrimination alleged in *De Funis v. Odengaard,* 40 LEd2d 164 (1964). Furthermore, special concessions to minority employees by an innocent employer would be in violation of the contractual rights of the majority employees under the employer's labor agreement with the Union. Thus, instead of settling anything, the employer would have twice as many problems as before including possible legal liability.

We do not believe that Congress intended to present an innocent employer with the alternative of making settlement with Hawkins and Hollins or continuing to suffer their picketing and boycotting activities, particularly when this unhappy predicament is not the result of anything the employer has done but results solely from the failure of the Union to do its job according to the standard set by the Court of Appeals in this case.

D. Union action was subject to contract bar.

Finally, the court completely overlooked the fact that bargaining was foreclosed because of the existence of valid labor agreement with a "zipper clause" by which the parties expressly agreed not to re-open for bargaining for any reason during the life of the contract. The Board has held that the parties may lawfully agree to waive their right to bargain during the contract term. (See discussion of "zipper clauses" in Morris, *The Developing Labor Law,* Section of Labor Relations Law, ABA, 1971, p. 470).

This is not merely a case where an employer refuses to discuss racial discrimination solely because the request is made during the contract term. Rather it is a case where the parties have bargained on the subject and have agreed that any problems involving discrimination arising during the term of the contract shall be handled through arbitration. To suggest that the Union bargain during the life of a contract on a subject already agreed upon is to make contracts meaningless where minority employees claim discrimination.

E. Hawkins and Hollins' interference with the Union was not a limited interference.

After declaring that Hawkins and Hollins rendered essentially ineffective the Union's efforts to correct alleged radical discrimination, the Court said:

> "We cannot agree with the Board, however, that this *limited interference alone* is sufficient to remove those concerted activities from the protec-

> tion of the Act." (Pet. App. 24.) (Emphasis supplied.)

Hawkins and Hollins' interference with the Union was not a merely limited one.

None of the cases discussed by the court below or cited in the many briefs, such as *N.L.R.B. v. R. C. Can Co.*, 328 F.2d 974, *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216, *N.L.R.B. v. Shop Rite Foods, Inc.*, 430 F.2d 786, and *Lee A. Consaul Co.*, 175 NLRB 547, *rev'd per curiam*, 469 F.2d 84, involved a direct attempt by employees to supplant and displace the union recognized by the employer and to substitute themselves as the bargaining representative of the employee as was done in this case. This is a substantially greater interference with the Union than a wildcat strike to protest the Union's delay or to protest the Union's plan of action.

Hawkins and Hollins prevented the Union from acting just as surely as if they had physically prevented the Union representatives from attending the adjustment board hearing. If this conduct did not remove the protection of the Act, we cannot imagine what would.

CONCLUSION

We respectfully submit that the court below violated the admonition of this Court in *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, by effectuating the policies of Title VII so single-mindedly as to ignore other and equally important Congressional objectives.

If it were necessary to protect the conduct of Hawkins and Hollins in order to effectuate the policies of Title VII there might be a basis for the court's decision. That it was not necessary is amply demonstrated by the remedies provided under the Union contract, under the state law and under the federal law.

Dated, October 1974.

Respectfully submitted,

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